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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN RYAN TERVEER,

Defendant and Appellant.

B214879

(Los Angeles County
Super. Ct. No. MA043919)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Charles A. Chung, Judge. Affirmed.

Shawn O'Laughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Justin Ryan Terveer was convicted, following a jury trial, of one count of petty theft with a prior theft-related conviction in violation of Penal Code¹ section 666 and one count of misdemeanor vandalism in violation of section 594, subdivision (a).² Appellant admitted the prior conviction allegations and the court found the allegations true. The trial court sentenced appellant to the low term of 16 months in state prison, doubled to 32 months pursuant to sections 667, subdivisions (b) through (i) and 1170.12 (the "Three Strikes" law), plus an additional one year term for a prior prison term within the meaning of section 667.5. The trial court imposed a concurrent one-year term for the vandalism count and struck two prior prison term allegations.

Appellant appeals from the judgment of conviction, contending that there is insufficient evidence to support the finding that his prior conviction was a strike conviction within the meaning of the Three Strikes law. Appellant further contends that the trial court abused its discretion in denying his motion to strike his prior conviction. We affirm the judgment of conviction.

Facts

On November 2, 2008, appellant entered a Carl's Jr. restaurant in Lancaster with a friend. Appellant went straight to the fountain drink dispenser and filled a cup he had brought with him from Subway. The manager told appellant that he had to pay for the drink. Appellant became angry and told an employee that he was going to "kick [his] fucking ass." Appellant took a picture frame off the wall and shattered it on the floor. Appellant and his friend then left the restaurant.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Appellant was charged with second degree commercial burglary in violation of section 458. The jury found appellant not guilty of this charge.

Discussion

1. Sufficiency of the evidence

Appellant contends there is insufficient evidence to show that he suffered a prior conviction within the meaning of the Three Strikes law.

Appellant's prior conviction was for a violation of section 246.3, discharge of a firearm. To qualify as a strike conviction, the conviction must be a violent felony within the meaning of section 667.5, subdivision (c) or a serious felony within the meaning of section 1192.7. (§ 667, subd. (d); § 1170.12, subd. (b).) Section 246.3 is not specifically listed in either section. The conviction does qualify as a strike if the defendant personally used a firearm. (§ 1192.7, subs. (c)(8) and (c)(23).)

Appellant contends, and respondent does not dispute, that the record of the prior conviction does not show that he personally used the firearm. Appellant contends that his admission in this case that he had suffered that prior conviction is not sufficient to support the true finding on the strike allegation.

Appellant points out that the mere admission of a prior conviction, without more, is not sufficient to support a true finding on an enhancement, where that enhancement requires something more than the bare fact of a commission. (See *People v. Golde* (2008) 163 Cal.App.4th 101, 113 [defendant admitted only a 'prior conviction' for a section 246.3 violation, not that the conviction was a serious felony or that the enhancement allegation was true].) The admission of an enhancement, however, admits every element of the enhancement charged. (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785, citing *People v. Jackson* (1985) 37 Cal.3d 826, 836; see *People v. Thomas* (1986) 41 Cal.3d 837, 844.)

People v. Thomas, supra, is instructive. In that case, the California Supreme Court considered the case of a defendant who admitted that he had been convicted of a "'serious felony, burglary, on charges brought and separately tried within the meaning of sections 667 and 1192.7 of the Penal Code.'" The defendant did not specifically admit that his convictions were for burglaries of residences, a requirement for a burglary to constitute a serious felony within the meaning of section 667. The Supreme Court held

that the defendant's admission was sufficient to establish the allegation. (*People v. Thomas, supra*, 41 Cal.3d at pp. 842, 845; see also *People v. French* (2008) 43 Cal.4th 36, 50 [*"Thomas establishes that a defendant's admission of an alleged enhancement is valid even if it does not include specific admissions of every factual element required to establish the enhancement"*].)

Here, appellant did not admit that his firearm discharge was a strike "within the meaning" of the Three Strikes law. His admissions, taken as a whole, are nonetheless sufficient to establish that he admitted to the allegation and not merely to a prior conviction.

Following the jury's verdict in this case, the trial court stated to appellant's counsel the court's understanding that appellant would "be admitting each of the priors, the prior portion of petty with a prior under 666. He will be admitting the strike, which is the 246.3, and then he would be admitting each of the one-year priors; is that correct?" Appellant's counsel agreed that it was.

The court then stated to appellant: "[Y]ou have certain rights as to each of these allegations. Again, that you were convicted of a prior conviction and served some jail time. That relates to count two, petty theft with a prior. [¶] *There is also the allegation under 1170.12(a) through (d) and 667(b) through (i) as to the negligent discharge of a firearm. That being a strike.* [¶] And then the 3 one-year priors under 667.5(b). And I don't know if it was a negligent discharge but it was a discharge of a firearm as far as the strike is concerned." (Emphasis added.) The trial court then advised appellant of his rights, and appellant waived those rights.

The trial court next asked appellant: "*And then for purposes of your strike prior do you admit that you did suffer a prior strike conviction under Penal Code section 246.3, a discharge of a firearm*, and that the conviction date was 10-3 of '07 out of the L.A. County Superior Court, case MA038110, and that you served two years in state prison? Do you admit that?" Appellant replied: "Yes." (Emphasis added.)

The transcript of the entire exchange leaves no doubt that appellant admitted that his prior conviction was a strike conviction under sections 667, subdivisions (b) through

(i) and 1170.12, the Three Strikes law. That admission is sufficient. (*People v. Thomas*, *supra*, 41 Cal.3d at pp. 841-843.)

2. Motion to strike

Appellant contends that the trial court abused its discretion in denying his motion to strike his prior "strike" conviction. He contends that although he has a lengthy criminal history, his current conviction was "simple petty theft of a soda pop" which places him outside the spirit of the Three Strikes law.

Rulings on motions to strike prior convictions are reviewed under the deferential abuse of discretion standard. Under that standard an appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling. (*People v. Carmony* (2004) 33 Cal.4th 367, 373.)

Appellant had a substantial criminal record consisting of three felonies and four misdemeanors in an eight year period beginning in 2001. He was on parole at the time of the current offense. In the current offense, appellant did not merely take a small amount of soda without paying for it. He also threatened store employees and took a picture frame off the wall and shattered it on the ground.

The trial court's comments indicate that it properly considered the nature and circumstances of appellant's current and prior convictions and the particulars of his background, character and prospects, and reached an impartial decision. (*People v. Williams* (1998) 17 Cal.4th 148, 161-164.) Thus, the trial court did not abuse its discretion.

Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

WEISMAN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.